Supreme Court, U.S.
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No. 93-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF ARIZONA,
Petitioner,
vs.
WADE BRUCE COOK,
Respondent.

On Petition For Writ Of Certiorari To The Arizona Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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July 8, 1994

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether this Court will take jurisdiction to decide constitutional questions which were never presented either to the trial court or the court to which certiorari is requested.

II. Whether *United States v. Dixon* impacts this case because neither court below relied on *Grady v. Corbin*.

III. Whether lower courts need guidance to apply *United States v. Dixon*.

COUNTERSTATEMENT OF THE CASE

A. Administrative Proceedings.

On February 7, 1989, the Securities Division of the Arizona Corporation Commission ("ACC") filed the equivalent of a complaint against Wade B. Cook ("Respondent") and various entities claiming violations of Arizona Revised Statutes § 44-1841, selling unregistered securities, A.R.S. § 44-1842, selling securities without a license, and A.R.S. § 44-1991, securities fraud (Motion to Dismiss Indictment With Prejudice, dated April 1, 1991 [hereinafter "Motion"], Attachment C, pp. 10-14). Based on these alleged violations, the Securities Division held a full hearing and sought relief which included:

> Order [Cook] to pay the Commission an administrative penalty of $5,000 for each violation of law alleged in this Notice, pursuant to A.R.S. § 44-2036.

(*Id.*, p. 14).

The ACC issued its opinion and found *inter alia* that Cook sold securities through material misrepresentations and omissions of

material fact by employing a "device, scheme, or artifice to defraud" in violation of A.R.S. § 44-1991 (Pet. App. D, p. D-16).[1] Although only three investors testified during the administrative hearing, the ACC ordered Cook to pay "restitution to [all of] the investors" "for securities sold within and from Arizona" (*id.*, pp. D-16 & D-19). The total amount of restitution was $390,841.50. The ACC also ordered Respondent to cease and desist the selling of securities in Arizona and to pay a $150,000 administrative penalty (*id.*, pp. D-17 & D-19). With regard to the administrative penalty, the ACC held:

> In light of the record evidence which establishes that [Cook] violated both the registration and anti-fraud provisions of the Act, and taking into consideration the fact that Mr. Cook appropriated investors' funds for personal purposes, the Commission agrees with the Division that [Cook] should be assessed an administrative penalty of $150,000.

(*Id.*, ¶ 9). The large restitution award coupled with the $150,000 administrative penalty forced Cook and his wife into bankruptcy (Motion, p. 4).

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[1] Petitioner argues that Count One of the indictment is a different offense than punished in the ACC proceeding. Count One charges Respondent with scheme or artifice to defraud in violation of A.R.S. § 13-2310. *See* Pet. App. E, p. E-2. In *Hernandez v. Superior Court*, 1994 Ariz. App. LEXIS 111 (May 19, 1994), the Arizona Court of Appeals found an identical charge to be a different offense in part because the ACC did not base its securities fraud violations on a scheme or artifice to defraud. *Id.* at *19-20. It is obvious from the ACC Order that the opposite is true with respect to Respondent. It is unclear what impact this difference would have on the double jeopardy analysis. Similarly, Count 18, the state RICO allegation, is based on predicate acts of securities fraud and scheme or artifice to defraud (Pet. App. E, pp. E-11 & E-12). These underlying predicate acts were also punished by the ACC. The remaining 16 counts of the indictment allege securities fraud violations and, despite Petitioner's contention to the contrary, are identical to the offenses punished by the ACC.

B. Criminal Proceedings.

On September 12, 1990, Petitioner indicted Respondent for the same conduct which formed the basis of the ACC action (Petitioner's Opening Brief to the Arizona Court of Appeals, p. 2). On April 1, 1991, Respondent filed a motion to dismiss the indictment with prejudice arguing that the $150,000 administrative penalty assessed against him was punitive in nature thereby amounting to prior jeopardy. Based upon this motion, the trial court ordered on April 29, 1991, an evidentiary hearing to determine whether the $150,000 administrative penalty was punitive or remedial.

During the evidentiary hearing, the Securities Division prosecutor testified as to the actual purpose of the administrative penalty. The prosecutor stated that the Securities Division requested and obtained the $150,000 administrative penalty "to deter Mr. Cook and others" from committing similar acts (Transcript of 5/3/91 at 29), and that there was no "remedial aspect" to the administrative penalty (*id.* at 30).

Petitioner opposed Respondent's motion to dismiss arguing that the $150,000 did not constitute punishment under *United States v. Halper*, 490 U.S. 435 (1989), and *Mullett v. Miller*, 816 P.2d 251 (Ariz. App. 1991), *cert. denied*, 112 S. Ct. 1245 (1992). Petitioner also argued that the holding in *United States v. Halper* and its progeny was limited to "small gauge offenders" which did not include Respondent.

The trial court found that the ACC intended the $150,000 administrative penalty to be a punitive sanction (Pet. App. F at ¶ 6), and that there was "no remedial aspect to this penalty" (*id.*, ¶ 8). The trial court then applied *United States v. Halper* and *Mullett v. Miller* and dismissed the indictment with prejudice because "the administrative penalty of $150,000 imposed upon defendant by the Commission was punitive rather than remedial in nature,

thereby [if the indictment would proceed forward, it would violate] the double jeopardy clause of the Fifth Amendment to the United States Constitution and Article 2, Section 10 of the Constitution of the State of Arizona" (*id.*, ¶ 11).

C. Arizona Court of Appeals' Decision.

Petitioner appealed from this order and raised the same two issues presented before the trial court. First, whether a civil proceeding that punished the defendant but preceded the criminal proceeding actuated double jeopardy protections. Second, whether the $150,000 administrative penalty constituted punishment under *United States v. Halper*. These were also the only issues the Arizona Court of Appeals decided in its June 10, 1993 opinion. *State v. Cook*, 870 P.2d 413 (Ariz. App. 1993) (Pet. App. A).[2]

The Arizona Court of Appeals affirmed and, specifically, held that: (1) the ACC's order and testimony from the ACC prosecutor provided "objective evidence of a punitive intent" which proved the ACC sought to punish and did punish Wade Cook in the administrative proceeding, *id.* at 416; (2) the $150,000 administrative penalty constituted punishment because it was not "rationally related to the goal of making the Government whole." *Id.* at 417.

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[2] SUPREME COURT RULE 14.1(h) requires Petitioner to "show that the federal question was timely and properly raised so as to give this Court jurisdiction . . . ." The Petition suggests Petitioner raised the issues for the first time to the Arizona Supreme Court. Respondent attaches Petitioner's Opening Brief to the Arizona Court of Appeals as evidence these issues were not raised before. *See* Appendix A.

D. Arizona Supreme Court.

Petitioner does not ask this Court to review any of the issues presented to or decided by the Arizona Court of Appeals. Rather, in a Petition for Review to the Arizona Supreme Court, Petitioner dramatically modified its position, dropped the issues presented to the court of appeals and presented three issues never specifically presented to either the trial court or the Arizona Court of Appeals. Two of the new issues concern *United States v. Dixon*, 113 S. Ct. 2849 (1993), decided shortly after the court of appeals' decision.[3] Basically, Petitioner argued that some of the offenses charged in the indictment are different than those punished in the ACC proceeding.

Cook responded to the Petition for Review by arguing that Petitioner waived all issues not previously briefed before the trial court or Arizona Court of Appeals, the record below was not created for Petitioner's new issues, and Arizona law independently provided a basis to affirm the court of appeals' decision.[4] On April 6, 1994, the Arizona Supreme Court denied the State's Petition for Review and thereby refused to hear the case (Pet. App. B). Petitioner then filed a timely Petition for Certiorari.

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[3] These are the same questions presently articulated in the Petition for Certiorari.

[4] Respondent argued that the Arizona double punishment statute, A.R.S. § 13-116, prevents Petitioner from punishing a defendant twice for the same "act or omission." *See, e.g., State v. Gordon*, 778 P.2d 1204 (Ariz. 1989); *State v. Rogowski*, 634 P.2d 387 (Ariz. 1981) (double punishment statute precludes multiple convictions for one act or omission). Respondent also argued that Arizona's double jeopardy clause defines "offense" more broadly than this Court. *See, e.g., State v. Cassius*, 520 P.2d 1109 (Ariz. 1974) ("[I]n order to constitute different offenses, no element of either offense may be an element of the other; *i.e.*, the two offenses must not contain a common element.... The federal courts use a different test, less favorable to the defendant. They hold that the offenses charged are not the same if each contains an element not contained in the other. *Blockburger v. United States*, 284 U.S. 299, 304 ... (1932)").

REASONS FOR DENYING THE WRIT

I. This Court Cannot Accept Jurisdiction Of The Petition Because The Questions Presented Were Never Presented To Or Decided By An Arizona Court.

"It has long been settled that this Court acquires no jurisdiction to review the judgment of a State court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such State court." *Whitney v. People of State of California*, 274 U.S. 357, 360 (1927) (citing numerous cases); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Crowell v. Randell*, 10 Pet. 368, 391 (1836); *Street v. New York*, 394 U.S. 576, 581-83 (1969); SUPREME COURT RULE 14.1(h). Failure to raise an issue as required by state law again divests this Court of jurisdiction. *Eldeman v. People of State of California*, 344 U.S. 357, 358 (1953) ("this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law"); *Hulbert v. City of Chicago*, 202 U.S. 275 (1906); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308 (1903); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974).[5] Petitioner admits it failed to raise the issues articulated in its Petition for Certiorari until it filed a Petition for Review to the Arizona Su-

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[5] Respondent expects Petitioner to argue that it could not raise the issue until this Court authored *Dixon*. Petitioner would be wrong. This Court dealt with an identical situation in *Herndon v. State of Georgia*, 295 U.S. 441, 442-43 (1935), where the petitioner also argued that the Court should accept jurisdiction because it claimed a new ruling was unanticipated and occurred only in time to file a motion for rehearing with the state court of appeals. *Id.* at 443-44. The Court found that the issue was ripe before the trial court due to an earlier state court opinion. The Court concluded that the petitioner should have anticipated a similar ruling in its case. The same is true here. *See Section II, infra.*

preme Court (Petition at 8). Petitioner also admits the Arizona Supreme Court refused to hear the case (Petition at 9).

Most analogous is *Bailey v. Anderson*, 326 U.S. 203 (1945), where the petitioner raised a federal question for the first time to the Supreme Court of Appeals of Virginia which refused to decide the new issue. 326 U.S. at 204-06. This Court dismissed the case for lack of jurisdiction:

> Unless [the constitutionally based issue] affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. Jacobi v. State of Alabama, 187 U.S. 133, 135-36 . . .; Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 309 . . .; Chicago, I. & L. R. Co. v. McGuire, 196 U.S. 128, 131 . . .; see Flournoy v. Weiner, 321 U.S. 253, 262, 263 . . . .

Id. at 207. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549-50 (1987); *Webb v. Webb*, 451 U.S. 493, 496-97 (1981).

This case presents the traditional situation. Petitioner did not raise the issues presented to this Court until it filed a Petition for Review to the Arizona Supreme Court. The Arizona Supreme Court requires parties to raise the issues below before it will entertain jurisdiction. *See, e.g., State v. Washington*, 447 P.2d 863, 865 (Ariz. 1968) ("We have repeatedly held that matters which were not raised in the lower court will not be considered as grounds for reversal in this Court."); *Van Loan v. Van Loan*, 569 P.2d 214, 216 (Ariz. 1977) ("The issue was first raised at oral argument before the Court of Appeals. The failure to raise an issue either at the trial level or in briefs on appeal constitutes a waiver of the issue."); *State v. McNeill*, 707 P.2d 972, 973 (Ariz. App. 1985) ("It is well settled that only issues presented in superior court are pre-

served for review; all others are waived.").[6] Moreover, the Arizona Supreme Court's denial of the Petition for Review, much the same as the denial of a petition for certiorari by this Court, has no legal impact. *See, e.g., Calvert v. Farmers Ins. Co. of Arizona*, 697 P.2d 684, 690 n.5 (Ariz. 1985) (denial of a petition for review "does not mean we accepted the Court of Appeals' legal analysis or conclusion . . . . Denial of a petition for review has no precedential value.").

Petitioner's waiver is "particularly inappropriate" because the new issues it raises are fact-intensive and prevent Respondent from properly preparing the appellate record. *State v. Brita*, 761 P.2d 1025 (Ariz. 1988) ("[i]t is particularly inappropriate to consider an issue for the first time on appeal where the issue is a fact-intensive one"). This is one of the express rationale the Court articulated for declining jurisdiction in *Cardinale v. Louisiana*, 394 U.S. 437 (1969), where the federal question was first presented in the Petition for Certiorari. This Court derives its jurisdiction to review state court opinions from statute, 28 U.S.C. § 1257, and has articulated multiple reasons for declining cases where issues were not briefed and decided by a state appellate court:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. *Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.* And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way

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[6] *See also* ARIZ. R. CRIM. P. 31.19(c)(2) (petition for review shall contain "[t]he issues . . . *decided by the Court of Appeals* and which the petitioner wishes to present to the Supreme Court for review") (emphasis added).

> which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

394 U.S. at 439 (emphasis added). *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

Each of the concerns expressed in *Cardinale* would exist were the Court to hear this case. Throughout the Petition, Petitioner claims "there is no evidence" in the appellate record that the offenses charged in the indictment are identical to those punished by the ACC (Petition at 12 (twice), & 17 n.3). Respondent disagrees with this assertion because the ACC order specifically concerns all investors; however, to the extent the record does not contain a more detailed list of the investors covered by the ACC order, it is only because Petitioner did not raise this issue at the trial court level.

Thus, the court below never confronted the two issues Petitioner seeks this Court to review. *Bailey v. Anderson*, *Eldeman v. People of State of California*, and numerous additional precedents control this case and require that the Court refuse to accept the Petition.

II. The Arizona Court Of Appeals Did Not Rely On *Grady v. Corbin*; Therefore, *United States v. Dixon* Has No Application To This Case.

Petitioner's arguments rest on the hypothesis that "both the trial court and the Arizona Court of Appeals apparently relied upon the holding in *Grady v. Corbin*, 495 U.S. 508 (1990)" — a case overruled by *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993). Petitioner's "hypothesis" is erroneous. Neither the trial court nor the Arizona Court of Appeals cite *Grady* for any proposition of law.

The issues Petitioner presented to both lower courts did not require reliance on *Grady*. The sole questions were whether punishment in a civil proceeding that preceded a criminal indictment could act as a jeopardy bar and whether the $150,000 administrative penalty assessed by the ACC constituted punishment. There was no question about whether the offenses were identical; there is no conflict with *Grady* or *Dixon*.

Nothing makes this point more plain than *State v. Nunez*, 806 P.2d 861 (Ariz. 1991), which predates Respondent's motion to dismiss the indictment on double jeopardy grounds. The double jeopardy clause protects against both successive prosecutions and multiple punishments. *Halper*, 490 U.S. at 440, *citing North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In *Nunez*, the Arizona Supreme Court held that "the modified *Blockburger* test as announced in *Grady* is limited to cases involving successive prosecutions." 806 P.2d at 865. *Nunez* also held that *Blockburger v. United States*, 284 U.S. 299 (1932), governs double jeopardy claims based upon multiple punishment. 806 P.2d at 864. Any argument by Petitioner that suggests *Dixon* provided the first opportunity to raise these arguments is untrue — Petitioner's own state supreme court has held otherwise.

III. Petitioner Has Not Shown That Lower Courts Need Guidance On How *United States v. Dixon* and *United States v. Halper* Should Interact.

With no conflict on the record, Petitioner attempts to make public importance by contending that "lower courts need guidance." They do not in Arizona. The recent decision of *Hernandez v. Superior Court*, 1994 Ariz. App. LEXIS 111 (May 19, 1994), expressly follows *Dixon*. No case from any other jurisdiction is cited as an example of the need for guidance.

CONCLUSION

Petitioner fails on both criteria for certiorari; either conflict or public importance. Moreover, Petitioner's "issues" were not presented or decided below. The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellant,	)	NO. 1 CA-CR 91-760
	)	
-vs-	)	MARICOPA COUNTY
	)	SUPERIOR COURT
WADE BRUCE COOK,	)	NO. CR 90-10121
	)	
Appellee.	)	
	)	

APPELLANT'S OPENING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Does the double jeopardy clause preclude the return of an indictment after the imposition of an administrative fine?

2. Is a dismissal mandated if the administrative fine is determined to be punitive, or may the fine be considered in imposing the sentence after conviction?

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STATEMENT OF THE CASE

On February 7, 1989, the Securities Division of the Corporation Commission initiated administrative proceedings against appellee as President and Director of American Business Alliance Inc. and Monarch Funding Corporation. The action was filed pursuant to Article XV of the Arizona Constitution and A.R.S. § 44-1823. On March 13 and 14, 1989, a Corporation Commission administrative hearing was held pursuant to A.R.S § 44-1972.

After considering the exhibits, the arguments of counsel, and the testimony of the seven witnesses, the Arizona Corporation Commission issued its findings of fact and conclusions of law on May 18, 1989. The Commission found that appellee Cook had unlawfully received $390,841.50 from over 150 investors, and that he thereby violated the registration and anti-fraud provisions of the Arizona Securities Act. The Commission ordered Cook to cease and desist his unlawful practices, to pay restitution to his victims, and to pay an "administrative penalty" of $150,000 pursuant to A.R.S. § 44-2036.

On September 12, 1990, a State Grand Jury returned an indictment against appellee, accusing him of one count of Fraudulent Schemes and Artifices (A.R.S. § 13-2310), eight counts of Sale of Unregistered Security (A.R.S. § 44-1841), eight counts of Sale of Security by Unregistered Salesman (A.R.S. § 44-1842), and one count of Conducting an Illegal Enterprise (A.R.S. § 13-2312). (Photostated Instrument, Item 1). The facts supporting the felony counts were the same facts which resulted in the Corporation Commission's earlier findings against appellee.

On April 1, 1991, appellee filed a motion to dismiss his indictment on grounds of double jeopardy, citing United States v. Halper, ____U.S.____, 109 S. Ct. 1892 (1989), and Mullett v. Miller, 82 Ariz. Adv. Rep 46 (Ct. App. 1990). On May 3, 1991, an evidentiary hearing was held before the Honorable Norman D.

Hall to determine the amount of the state's costs incurred for the administrative procedure, as suggested by Mullet.

Based upon the evidence and appellee's stipulation, Judge Hall made a finding of $1,492.05 costs and $30,000 for attorneys' fees, CPA's fees, and investigators' fees. (Minute Entry dated May 9, 1991, at paragraph 7). He determined that the $150,000 administrative penalty imposed by the Commission was punitive and thereby precluded the later indictment returned by the State Grand Jury. (Id. at paragraph 11.) Judge Hall, therefore, dismissed the indictment with prejudice.

The State of Arizona appeals the order of dismissal pursuant to A.R.S. 13-4032(1). The State filed timely notice of appeal on May 21, 1991. (Photostated Instrument, Item 32). This Court has jurisdiction to hear this appeal pursuant to Ariz. Const. Art. VI, Sec. 9, and A.R.S. §§ 12-120.21(A) (1), 13-4031, and 13-4032.

ARGUMENTS

I

THE DOUBLE JEOPARDY CLAUSE DOES NOT PRECLUDE THE RETURN OF AN INDICTMENT AFTER THE IMPOSITION OF AN ADMINISTRATIVE FINE.

The trial court held that under Mullett v. Miller, 82 Ariz. Adv. Rep. 46 (Ct. App. 1990), the fine was disproportionate to the costs of prosecuting the administrative proceeding, and therefore dismissed the prosecution. The state believes the trial court was in error.

A. Double Jeopardy does not bar the subequent criminal prosecution after the administrative penalty was imposed.

In United States v Halper, the United States Supreme Court held that:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

109 S. Ct at 1903. The Court further stated:

> We cast no shadow on these time-honored judgments. [citing cases allowing criminal and civil remedies arising from the same conduct] What we announce now is a rule for the rare case, the case such as the one before us where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damage he has caused . . . We must leave to the trial court the discretion to determine on the basis of such an accounting, the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

Id. (emphasis added)

The Supreme Court specifically recognized the constitutionality of companion criminal and civil cases arising out of the same or similar facts. The Court also recognized that when determining proportionality, the government's loss is more than just the cost of investigation and prosecution, but also includes such intangibles as the loss of business opportunities that would have been available to others but for the defendant's criminal action.

Halper, 109 S. Ct at 1900; Rex Trailer Company v. United States, 350 U.S. 148, 152, 76 S. Ct. 219, 222 (1956). The Court ruled that a $130,000 civil penalty imposed could be "sufficiently disproportionate" to constitute unlawful double punishment where the loss as the result of the unlawful conduct was $583 and where costs were, at most, $16,000. Critical to the Court's analysis was whether the Government sought the civil penalty in a "subsequent proceeding because it is dissatisfied with the sanction obtained in the first proceeding." 109 S. Ct. at 1903 n.10.

After Halper, the Supreme Court was again asked to interpret the double jeopardy clause as it related to multiple punishments in Jones v. Thomas, ____ U.S. ____, 109 S. Ct. 2522 (1989). The Supreme Court held that in the multiple punishments context, double jeopardy is "limited to ensuring that the total punishment did not exceed that authorized by the legislature." 109 S. Ct. at 2525, (citing Halper). The Court specifically noted that the double jeopardy clause does not exist to provide "unjustified windfalls" to a defendant. 109 S. Ct. at 2528.

In Mullett v. Miller, Division Two of this Court ostensibly applied the Halper doctrine and remanded the case so the trial court could determine whether a $380,000 administrative penalty was purely punitive as opposed to remedial. 82 Ariz. Adv. Rep. 46. In its analysis, the court ruled that jeopardy did not attach solely by reason of the Corporation Commission's administrative proceeding, since it was not considered a prosecution.[1] Id. at p.47. The court went on to rule that only a fine that was "purely punitive as opposed to remedial" would preclude a later criminal prosecution. Id. at 48. The court, therefore, remanded the case for the

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[1] On this point, the court was correct because the double jeopardy clause is not breached by the filing of a criminal prosecution after a civil or administrative action because there has been no acquittal or conviction upon which jeopardy could have attached. Serfass v. United States, 420 U.S. 377, 392, 95 S. Ct. 1055, 1064 (1975); North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); accord, A.R.S. § 13-116.

trial court to determine whether the $380,000 administrative fine imposed was "rationally related to making the state whole in connection with the proceedings before the Commission." Id. The court has misconstrued Halper. See State v Darby, 246 N.J. Super 432, 587 A.2d 1309 (App. Div. 1991) (New Jersey Court of Appeals held on similar facts that subsequent criminal prosecution was permissible).

In his ruling, Judge Hall followed the analysis of the Court of Appeals' decision in Mullett. He correctly found that the previous action by the Corporation Commission did not, by itself, attach jeopardy. Guided by Mullett, Judge Hall then ruled that the $150,000 fine was disproportionate to the $31,500 costs of prosecuting the administrative proceeding. Judge Hall deemed that the fine was punishment, and thereby constituted jeopardy, which precluded the later indictment. Because the Court of Appeals erred in their analysis of what the double jeopardy clause requires when the state seeks to prosecute criminally after a "civil" sanction has been imposed on the same conduct, Judge Hall's decision to dismiss the indictment must be reversed.

In the present case, appellee not only injured the 150 investor-victims by defrauding them out of $390,841.50, but he also diverted that same amount of funds from access to other available legitimate capital formation. The combined overall effect of Cook's fraud thus injured the state's economy, and ultimately reduced its tax base. This is an intangible cost that is directly related to "making the government whole." Halper, 109 S. Ct. at 1903.

The Commission's $150,000 penalty was not "overwhelmingly disproportionate to the damages he has caused." Halper, 109 S. Ct. at 1902 (emphasis added). It was also far less than the $5,000 per incident penalty that could have been imposed under A.R.S. § 44-2036. Without a showing of overwhelming disproportionality, the sanction is presumed to make the government whole. Id.

Appellee was, therefore, not entitled to relief under the double jeopardy clause.

In the present case, the Corporation Commission's order imposed three remedies - injunctive relief, restitution, and liquidated civil penalties. All three of these sanctions are remedial. Halper, 109 S. Ct. at 1902; Rex Trailer, 76 S. Ct. at 221 (civil sanctions calculated at $2,000 for each act, plus double damages and actual costs did not amount to punishment); United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943) (defendant fined $54,000 in criminal prosecution; subsequent civil penalty based on $2,000 per count, double the amount of actual damages and costs of the suit totalling $315,000 did not constitute punishment); Helvering v. Mitchell, 303 U.S. 391, 58 S. Ct. 630 (1938) (sanction equalling 50 percent of the $728,709.84 sought for fraudulent filing held not to be a punishment but to reimburse for investigatory and other costs of the taxpayer's fraud); Karpa v. C.I.R., 909 F.2d 784, 788 (4th Cir. 1990) (25% tax penalty is civil sanction because it reflects the costs of investigation and prosecution); United States v. Naftalin, 606 F.2d 809, 812 (8th Cir. 1989) (S.E.C. sanctions are remedial because they are designed to protect the public and are not punitive). The trial court's reliance on Mullett was inconsistent with the United States Supreme Court's holdings in Halper, Hess, Helvering and Rex Trailer. The government is entitled to be awarded civil sanctions in order to be made whole. This amount is more than the cost of prosecution, and includes the actual damage suffered. Halper, 109 S. Ct. at 1902; Rex Trailer, 76 S. Ct. at 221; Ness, 63 S. Ct. 379.

II

THE REMEDY OF DISMISSAL IS LIKEWISE NOT NECESSARY AS APPELLEE, IF CONVICTED, CAN BE SENTENCED IN ACCORDANCE WITH THE PREVIOUS FINE IMPOSED.

There is nothing in the Halper opinion that suggests that the civil sanctions should act as a bar to a subsequent criminal prosecution. Indeed, if a criminal defendant has been convicted and sentenced, the state may still seek civil penalties for the purpose "of making the Government whole." 109 S. Ct. at 1903. The Court noted in Thomas, the goal against double punishment is to ensure that the defendant is not punished in excess of that "authorized by the legislature." 109 S. Ct. at 2525; Halper, 109 S. Ct. at 1903.

Under A.R.S. § 13-603, upon conviction, the trial court would be authorized to sentence appellee to a term of imprisonment, a fine, or both. If Cook is convicted of the crimes charged in the indictment, the sentencing court, under Thomas and Halper, would consider the nature of the Corporation Commission's sanctions at sentencing so that he is not punished in excess of that "authorized by the legislature." Thomas, 109 S. Ct. at 2525; Halper, 109 S. Ct. at 1903. The sentencing court can, in effect, "offset" appellees' sentence in the criminal proceeding in light of the civil sanctions imposed in the previous civil proceeding. A.R.S. § 13-807; State v. Iniguez, 84 Ariz. Adv. Rep. 26 (App. 1991). Prosecuting Cook after the Corporation Commission's action does not violate double jeopardy, therefore, since it does not put him twice in jeopardy or subject him to a penalty above that authorized by the legislature.

Both the Court of Appeals in Mullett and Judge Hall in the present case ignored the Supreme Court's caution that its ruling in Halper was a "rare exception" for "a small-gauge offender" who was subjected to a penalty which wa"overwhelmingly dispro-

portionate" to the damage he caused. Appellee is not a small gauge offender and the administrative penalty was not overwhelming disproportionate to the damage he caused. The Commission's order, therefore, was clearly outside the scope of the "rare case" at issue in Halper. Indeed, the present case is far closer in facts to United States v. Bizzell, 921 F.2d 263, 267 (10th cir. 1990), and State v. Darby where the administrative fines were held to be remedial and not punitive because they were not overwhelmingly disproportionate to the government's costs.

CONCLUSION

With logic that only a lawyer could understand, appellee has not yet paid a cent of the administrative fine imposed on him on May 18, 1989, yet his criminal indictment has been dismissed because of the imposition of that administrative fine. Application of the double punishment doctrine should only be done in rare cases, for small-gauge offenders when the second proceeding's sanction is overwhelmingly disproportionate to the damage he caused. Appellee's case is not the rare case. Appellee is not a small-gauge offender. Appellee's fine was not overwhelmingly disproportionate to the damage he caused. The Double Jeopardy Clause was not intended to provide appellee with such an "unjustified windfall."

Judge Hall's decision to dismiss the indictment and preclude the state from prosecuting appellee for his criminal acts should be reversed.

Respectfully submitted

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